IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

SAVAGE PUBLIC SCHOOLS, RICHLAND CO. ELEMENTARY DISTRICT #7, and HIGH SCHOOL DISTRICT #2,

Petitioners and Respondents,

vs.

SAVAGE EDUCATION ASSOCIATION, AFFILIATED WITH MONTANA EDUCATION ASSOCIATION, and MONTANA BOARD OF PERSONNEL APPEALS,

Appellants and Respondents.

Appeal from: District Court of the Seventh Judicial District, In and for the County of Richland Honorable L. C. Gulbrandson, Judge presiding.

Counsel of Record:

For Appellants:

Hilley & Loring, Great Falls, Montana
Emilie Loring argued, Great Falls, Montana
James Gardner argued, Helena, Montana

For Respondents:

R. W. Heineman argued, Wibaux, Montana
Gene Huntley, Baker, Montana

For Amicus Curiae:

Smith Law Firm, Helena, Montana
Chadwick Smith argued, (Montana School Boards Assoc.) Helena, Montana

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Submitted: May 14, 1982

Decided: July 6, 1982

Filed: JUL 6 - 1982

Thomas J. Kearney

Clerk

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

The Savage Education Association (SEA) and the Board of Personnel Appeals (the Board) appeal from the decision of the Richland County District Court reversing the Board's order. The Board had found that the School District had committed an unfair labor practice in violation of section 39-31-401(5), MCA, by its refusal to submit a grievance to arbitration. The Board specifically stated that the School District enjoyed unfettered discretion in hiring decisions, but their failure to arbitrate the procedural conditions for nonrenewal of a nontenured teacher violated the collective bargaining agreement between the parties. In reversing the Board's order, the Richland County District Court went far beyond the narrow ruling of the BPA and held that all matters relating to hiring and nonrenewal of nontenured teachers were statutorily and contractually reserved to the sole discretion of the school district.

On appeal, the SEA and Board contend that the District Court abused its discretion by deciding issues not ruled upon by the administrative agency. We find that the District Court exceeded the proper scope of judicial review and reverse its judgment, reinstating the Board's final order. We hold that the refusal of the school district to arbitrate whether the procedural steps for nonrenewal were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. Because the question is not properly before us, we do not address the other issue raised by appellants: Whether a school district may agree to arbitrate the substantive basis of nonrenewal of a nontenured teacher.

As the exclusive representative for the teachers, the SEA entered into a collective bargaining agreement with the school district. Art. XVII of the agreement provides for a grievance procedure with final and binding arbitration as the final step. Art. XIII, § 2 of the agreement guaranteed certain procedural rights to nontenured teachers:

> "Section 2: Notice of Termination (Nontenure): Every nontenure teacher being terminated shall be entitled to the following:
>
> "1. The teacher shall be notified in writing before the fifteenth (15) day of April.
>
> "2. Within ten (10) days after receipt of such notice the teacher may request, in writing, a written statement declaring clearly and explicitly the specific reason(s), for the termination of his or her service. The school district will supply such statement within ten (10) days after the request.
>
> "3. The teacher may, within ten (10) days after receipt of the statement of reasons, appeal the termination through the grievance procedure."

On March 29, 1979, the school district notified two nontenured teachers that their contracts would not be renewed for the following year. The teachers filed a timely grievance alleging violation of certain articles in the collective bargaining agreement. The matter went through the initial steps of the grievance procedure without satisfactory resolution. The SEA demanded arbitration, but the school board refused, and the matter was submitted to the Board.

The hearing examiner found that the parties had, under the collective bargaining agreement, agreed to allow a nontenured teacher to submit the matter of nonrenewal to arbitration, and had, therefore, refused to bargain in good faith by refusing to submit the issue of teacher nonrenewal to arbitration. The school district appealed the hearing examiner's findings and conclusions to the Board.

On appeal, the Board found that the issue for arbitration was much narrower and concerned only whether the procedure

agreed to by the parties was properly used in termination of the teachers. The Board very specifically stated:

> ". . . An arbitrator, therefore, merely has to determine whether or not the procedure agreed to by the parties was properly used in the termination of the nontenured teacher. The basis of the dismissal is not a subject of review by the arbitrator. That is, if the teacher was properly evaluated and the basis for the dismissal was discussed with the teacher, then the termination will be upheld. The basis of the termination could be for a good reason or a bad reason, so long as it was discussed with the teacher. As far as this Board can see, the school district has retained unfettered control over the reasons for dismissal of a nontenured teacher is just, this Board will reserve for a different hearing where that issue is presented to it."

The District Court did not address the very narrow interpretation of the Board. Rather, it adopted the arguments of the school district and held that the school district has the sole discretion not to renew the contracts of the two nontenured teachers; that the nonrenewal of their contracts was not a grievance under the collective bargaining agreement; and that the school district was without authority to bargain with the SEA regarding matters of inherent managerial prerogatives, including hiring and retention of employees.

Appellants, SEA and the Board, take exception to all of the District Court's findings and contend that the District Court did not decide the issue that was before it. The SEA and the Board claim that the District Court was limited in its review of the Board's order which required that the only issue to go to arbitration was whether the termination procedures of the bargaining agreement were followed. The District Court went on to decide the broader issue of whether the school district has to arbitrate the substantive basis of nontenured teacher nonrenewal.

The judgment of the District Court is very broad and does not address the specific ruling of the Board. Judicial

review of the Board is governed by section 39-31-409, MCA, and section 2-4-701, et seq., of the Montana Administrative and Procedure Act. A review of the Board's order, in conjunction with the judgment of the District Court clearly shows that the District Court exceeded the proper scope of judicial review. The Board recognized that the issue as to whether nonrenewal was for just cause was not before it. It was unnecessary for the District Court to address the issue.

The school district argues that it was the Board who failed to address the issue stipulated to it by the parties. The stipulated issue was: "whether the refusal of the school district to submit the matter of nonrenewal of a nontenured teacher to binding arbitration is a refusal to bargain in good faith . . ." The Board clearly considered this issue and narrowed it to fit the situation.

The procedures outlined in Art. XIII, § 2 of the Collective Bargaining Agreement merely grant nontenured teachers the right to notice and an explanation for their nonrenewal. These same procedures are already provided for by statute. See section 20-4-206, MCA. The provision of the collective bargaining agreement at issue here merely incorporates these statutory requirements and allows the nontenured teacher access to the grievance procedure for alleged noncompliance by the school district. This does not affect any of the statutorily or contractually reserved management rights of the school district. Such procedural steps for nonrenewal are clearly "conditions of employment" and are subject to collective bargaining. As we stated in Wibaux Ed. Ass'n. v. Wibaux Cty. High School (1978), 175 Mont. 331, 573 P.2d 1162:

> "It is clear that arbitration [under the collective bargaining agreement] would be available on a limited basis if the 'grievance' was that the school officials or School Board failed to comply with either the evaluation or hearing procedures outlined in [the agreement]." 573 P.2d at 1164.

The refusal of the school district to submit this matter to arbitration violated Art. XIII, § 2 of the Collective Bargaining Agreement. This was a failure to bargain in good faith and constitutes an unfair labor practice as defined in section 39-31-401(5), MCA. See City of Livingston v. Montana Council No. 9, etc. (1977), 174 Mont. 421, 571 P.2d 374.

By deciding issues not properly before it, the District Court exceeded the proper scope of judicial review. Accordingly, we reverse the judgment of the District Court and reinstate the Board's final order.

Frank I. Haswell
Chief Justice

We Concur:

Gene B. Daly

John Conway Harrison

Mark M. Morrison, Jr.

John C. Sheehy

R. C. Sullivan
Justices

Mr. Justice Daniel J. Shea concurring:

I join in the majority opinion but also add that perhaps the trial court would not have been so broad in its rulings, that is, deciding issues not before it, if it had not adopted word for word the proposed findings and conclusions of the prevailing parties. A casual study of the respondents' proposed findings and conclusions would have demonstrated that they exceeded by far the issues which the trial court was called on to decide.

Daniel J. Shea
Justice

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-79:

SAVAGE EDUCATION ASSOCIATION, AFFILIATED WITH MONTANA EDUCATION ASSOCIATION, Complainant, - VS - SAVAGE PUBLIC SCHOOLS, RICHLAND COUNTY ELEMENTARY DISTRICT #7 AND HIGH SCHOOL DISTRICT #2, Defendant.	FINAL ORDER

* *

Exceptions were filed to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order by Defendant Savage Public Schools. Defendant argues that the Recommended Order requiring Defendant to submit to arbitration the termination of two non-tenured teachers is in direct violation of the "sole discretion" of the school board under Section 20-3-324, MCA, to dismiss or employ a teacher, and the "inherent managerial prerogative" of management to rehire a non-tenure teacher as provided for in Section 39-31-303 MCA. The Montana School Boards Association submitted an amicus curiae brief in support of Defendant.

DECISION

This Board, on review of the record of the proceedings, does not find the issues as above stated by the Defendant, to be the issue of this proceeding. Article XVII of the contract in question is a grievance procedure which culminates in final and binding arbitration. Article XIII is the article which states how the school district shall terminate teacher contracts. Section 1 provides for proper evaluation in conformance with Article XII of the agreement. Section 1 of Article XIII also provides that a reason which "could possibly be cited as a

reason for termination of a teacher's services" be discussed with the teacher. Section 2 of Article XIII merely writes Section 20-4-206 MCA into the contract. An arbitrator, therefore, merely has to determine whether or not the procedure agreed to by the parties was properly used in the termination of the non-tenured teacher. The basis of the dismissal is not a subject of review by the arbitrator. That is, if the teacher was properly evaluated and the basis for the dismissal was discussed with the teacher, then the termination will be upheld. The basis of the termination could be for a good reason or a bad reason, so long as it was discussed with the teacher. As far as this Board can see, the school district has retained unfettered control over the reasons for dismissal of a non-tenured teacher.

Whether or not an arbitrator can decide the issue of whether or not the dismissal of a non-tenured teacher is just, this Board will reserve for a different hearing where that issue is presented to it.

IT IS THEREFORE ORDERED:

1. The exceptions to the hearing examiner's Findings of Fact, Conclusions of Law and Recommended Order are denied.

2. The Findings of Fact, Conclusions of Law, and Recommended Order of the hearing examiner is adopted as the Final Order of this Board.

DATED this 12 day of September, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley
Chairman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #30-79:

SAVAGE EDUCATION ASSOCIATION, AFFILIATED WITH MONTANA EDUCATION ASSOCIATION, Complainant, -vs- SAVAGE PUBLIC SCHOOLS, RICHLAND COUNTY ELEMENTARY DISTRICT #7 AND HIGH SCHOOL DISTRICT #2, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

* *

On July 20, 1979, Complainant, in above captioned matter, filed an unfair labor practice charge with the Board of Personnel Appeals charging the Defendant with refusal to bargain in good faith, in violation of Section 39-31-401(5) MCA.

Defendant, on August 8, 1979, filed an ANSWER TO COMPLAINT with this Board and moved for dismissal of the unfair labor practice charge.

By NOTICE OF HEARING dated October 16, 1979, this Board denied Defendant's motion for dismissal and set date for formal hearing.

During the pre-hearing conference held in this matter on October 31, 1979, in the Courtroom, Dawson County Courthouse, Glendive, Montana, the Parties stipulated to waive the formal hearing and to submit the matter in briefs. The last brief submitted was received January 21, 1980.

The issue in this matter, as stipulated to by the parties, is as follows: Is the refusal of the School District, the Defendant, to submit the matter of the non-renewal of a nontenured teacher to binding arbitration an unfair labor practice in violation of Section 39-31-401(5) MCA?

After a thorough review of the record, including the briefs submitted by the Parties, I make the following:

FINDINGS OF FACT

1. The Savage Education Association affiliated with the Montana Education Association, Complainant, is recognized by Savage Public Schools, Richland County Elementary District #7 and High School District #2, Defendant, as the exclusive representative for teachers employed by the districts.

2. A collective bargaining agreement existed between the Complainant and the Defendant from January 20, 1978, through June 30, 1979. An existing collective bargaining agreement became effective March 26, 1979, and shall remain effective through July 1, 1981.

3. The two collective bargaining agreements (cited above) are identical in the following relevant portions:

A. ARTICLE IV

SCHOOL DISTRICT RIGHTS

Section 1: Inherent Managerial Rights: The exclusive representative recognizes that the school district is not required to and is not permitted to meet and negotiate on matters of inherent managerial prerogatives, which include but are not limited to the following: directing employees, hiring, promoting, transferring, assigning and retaining employees, relieving employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive, maintaining the efficiency of government operations, determining the methods, means, job classifications, and personnel by which government operations are to be conducted, taking whatever actions may be necessary to carry out the missions of the school district in situations of emergency, and establishing the methods and processes by which work is performed. The exclusive representative further agrees that all management rights as defined by the law are reserved to the school district.

B. ARTICLE XIII

EMPLOYMENT STATUS OF TEACHERS

Section 2: Notice of Termination (Nontenure): Every nontenure teacher being terminated shall be entitled to the following:

1. The teacher shall be notified in writing before the fifteenth (15) day of April.

notice the teacher may request in writing, a written statement declaring clearly and explicitly the specific reason, (s) for the termination of his or her service. The school district will supply such statement within ten (10) days after the request.

3. The teacher may, within ten (10) days after receipt of the statement of reasons, appeal the termination through the grievance procedure.

C. ARTICLE XVII

GRIEVANCE PROCEDURE

Section 1: Grievance Definition: A "grievance" shall mean an allegation by a teacher, a group of teachers, or the exclusive representative resulting in a dispute or disagreement between the teacher and the school district as to the interpretation or application of terms and conditions contained in this Agreement.

Section 2: Representative: The teacher, a group of teachers, or the exclusive representative, administrator, or school district may be represented during any step of the procedure by any person or agent designated by such party to sit in his behalf.

Section 3: Individual Rights: Nothing contained herein shall be construed as limiting the right of any teacher having a complaint to discuss the matter with the appropriate supervisor and to have the problem adjusted without the intervention of the Association. Exhaustion of the informal complaint procedure is not a requisite to invoking the formal grievance procedure.

Section 4: Definitions and Interpretations:
Subd. 1. Extention: Time limits specified in this Agreement may be extended by mutual agreement.
Subd. 2. Days: Days shall mean teacher work days except as otherwise indicated in this Article.
Subd. 3. Computation of Time: In computing any period of time prescribed or allowed by procedures herein, the date of the act, event, or default for which the designated period of time begins to run shall not be included. The last day of the period so computed shall be counted unless it is a Saturday, a Sunday, or a legal holiday, in the event the period runs until the end of the next day which is not a Saturday, a Sunday, or legal holiday.
Subd. 4 Filing and Postmark: The filing or service of any notice or document herein shall be timely if it is personally served or if it bears a certificate postmark of the

period.

Section 5: Time Limitation and Waiver: Grievance shall not be valid for consideration unless the grievance is submitted in writing to the school district's designee, setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within ten (10) days after the date of the first event or knowledge of the act giving rise to the grievance occured. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the teacher and the school district's designee.

Section 6: Adjustment of Grievance: The school district and the teacher shall attempt to adjust all grievances which may arise during the course of employment of any teacher within the school district in the following manner:
Subd. 1. Level I: If the grievance is not resolved through informal discussions, the school district designee shall give a written decision on the grievance to the parties involved with ten (10) days after receipt of the written grievance.
Subd. 2 Level II: In the event the grievance is not resolved in Level I, the decision rendered may be appealed to the Superintendent of Schools, or his designee, provided such appeal is made in writing within five (5) days after receipt of the decision in Level I. If a grievance is properly appealed to the Superintendent, the Superintendent or his designee shall set a time to meet regarding the grievance within ten (10) days after receipt of the appeal. Within five (5) days after the meeting, the Superintendent or his designee shall issue a decision in writing to the parties involved.
Subd. 3 Level III: If the grievance has not been resolved at Level II, the grievance may be presented to the Board Of Trustees for consideration. The Board of Trustees reserves the right to review or not to review the grievance but must make that decision with fifteen (15) days after receipt of the written appeal. In the event the Board of Trustees chooses to review the grievance, the Board or a committee or representative(s) thereof shall within fifteen (15) days, meet to hear the grievance. After this meeting, the Board shall have a maximum of fifteen (15) days in which to decide the grievance in writing.
Subd. 4 Denial of Grievance: Failure by the school district to issue a decision within the time periods provided herein shall consti-

into a denial of the grievance, and the teacher may appeal it to the next level. This shall not negate the obligation of the school district to respond in writing at each level of this procedure.

Subd. 5 Step Waiver: Provided both parties agree in writing, any level of this grievance procedure may be by-passed and processed at a higher level.

Section 7: Arbitration:

Subd. 1. Procedure: In the event that the parties are unable to resolve a grievance, it may be submitted to arbitration as defined herein, provided a notice of appeal is filed in the office the the Superintendent within ten (10) days of the receipt of the decision of the school district in Level III.

Subd. 2. Selection of Arbitrator: Upon submission of a grievance to arbitration under the terms of this procedure, the parties shall, within five (5) days after the request to arbitrate, attempt to agree upon the selection of an arbitrator. If no agreement on an arbitrator is reached after five (5) days, either party may request the Montana Board of Personnel Appeals to submit, within ten (10) days to both parties, a list of five (5) names. Within five (5) days of receipt of the list, the parties shall select an arbitrator by striking two (2) names from the list of alternate order, and the name so remaining shall be the arbitrator. Failure to request an arbitration list from the Montana Board of Personnel Appeals within the time periods provided herein shall constitute a waiver of the grievance.

Subd. 3. Hearing: The grievance shall be heard by a single arbitrator and the parties shall have the right to a hearing at which time both parties will have the opportunity to submit evidence, offer testimony, present witnesses and subpoena them and make oral or written arguments relating to the issues before the arbitrator.

Subd. 4. Decision: The decision by the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator is cases properly before him shall be final and binding upon the parties.[SIC]

Subd. 5. Expenses: Each party shall bear its own costs of arbitration except that the fees and charges of the arbitrator shall be shared equally by the parties. However, the party ordering a copy of the transcript shall pay for such copy.

Subd. 6. Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator

and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy as defined in Article IV of this Agreement. In considering any issue in dispute, in its order, the arbitrator shall give due consideration to the statutory rights and obligations of the school district to efficiently manage and conduct its operation rights in the operation of the school district.
Subd. 7: No Reprisals: No reprisals of any kind will be taken by the Board or the school administration against any person because of participation in this grievance procedure.

4. Dorothy Tone and Connie Undem were employed by the Defendant, both were untenured teachers and both were covered by the collective bargaining agreements (agreements described in Findings of Fact #2).

5. Both Ms. Tone and Ms. Undem were given notice of the non-renewal of their teaching contracts by the Defendant. Both Ms. Tone and Ms. Undem implemented procedures outlined in Findings of Fact #3-B and #3-C.

6. The non-renewal of both Ms. Tone and Ms. Undem, also captioned "grievances", were correctly processed through all steps of the Grievance Procedure (see Findings of Fact #3-C) preceding arbitration.

7. The Defendant refused to submit the matter of non-renewal or, "grievances" of Ms. Tone and Ms. Undem to arbitration.

DISCUSSION

The ultimate question in this matter, as aforementioned, is: Whether the refusal of the School District to submit the matter of nonrenewal of nontenured teachers to binding arbitration is a refusal to bargain in good faith in violation of Section 39-31-401(5) MCA? For purposes of discussion in this particular case, the ultimate question can be divided into four parts:

1. What are the statutory rights, powers and duties of the Trustees of School Districts to hire, dismiss or nonrenew nontenured teachers?

2. Did the School District agree to arbitrate the non-renewal of nontenured teachers?

3. If such an agreement was made to arbitrate the non-renewal of nontenured teachers, did the School District have authority to make such an agreement?

4. Did the negotiated collective bargaining agreement change any of the rights, duties or powers delegated to the School District?

In addition to the statutory rights reserved for public employers as defined in the Collective Bargaining Act for Public Employees;

> 39-31-303. Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:
> (1) direct employees;
> (2) hire, promote, transfer, assign, and retain employees;
> (3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;
> (4) maintain the efficiency of government operations;
> (5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;
> (6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;
> (7) establish the methods and processes by which work is performed.

The Defendant cited several other statutes to document the rights, powers and duties it posesses:

> 20-3-324. Powers and duties. As prescribed elsewhere in this title, the trustees of each district shall have the power and it shall be their duty to perform the following duties or acts:
> (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board may deem necessary, accepting or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of the school personnel part of this title;

> 39-31-304. Negotiable items for school districts. Nothing in this chapter shall require or allow boards of

any matter other than matters specified in 39-31-305(2).

39-31-305. Duty to bargain collectively -- good faith. (1) The public employer and the exclusive representative, through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

20-4-201. Employment of teachers and specialists by contract. (1) The trustees of any district shall have the authority to employ any person as a teacher or specialist, but only a person who holds a valid Montana teacher or specialist certificate or for whom an emergency authorization of employment has been issued that qualifies such person to perform the duties prescribed by the trustees for the position of employment. Each teacher or specialist shall be employed under written contract, and each contract of employment shall be authorized by a proper resolution of the trustees and shall be executed in duplicate by the chairman of the trustees and the clerk of the district in the name of the district and by the teacher or specialist.

20-4-203. Teacher tenure. Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher shall be deemed to be reelected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with such teacher, unless:

(1) the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204;

20-4-206. Notification of nontenure teacher reelection -- acceptance -- termination and statement of reason. (1) The trustees shall provide written notice by April 15 to all nontenure teachers who have been reelected. Any nontenure teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.

(2) Any nontenure teacher who receives notification of his reelection for the ensuing school fiscal year shall provide the trustees with his written acceptance of the conditions of such reelection within 20 days after the receipt of the notice of reelection. Failure to so notify the trustees within 20 days may be considered nonacceptance of the tendered position.

> tion, the teacher may within 10 days after receipt of such notice make written request of the trustees for a statement in writing of the reasons for termination of employment. Within 20 days after receipt of the request, the trustees shall furnish such statement to the teacher.
> (4) The provisions of this section shall not apply to cases in which a nontenure teacher is terminated when the financial condition of the school district requires a reduction in the number of teachers employed and the reason for the termination is to reduce the number of teachers employed.

Defendant argues these above cited rights, powers and duties are preserved under terms of the negotiated collective bargaining agreement. Article VI - SCHOOL DISTRICT RIGHTS, Section 1 - Inherent Managerial Rights is cited (see Fings of Fact 3-A):

> . . . inherent management prerogatives, which include, but are not limited to the following: directing employees, hiring, promoting, transferring, assigning and retaining employees, . .

Article XVII - GRIEVANCE PROCEDURE, Section 7 - Arbitration, Subsection 6 - Jurisdiction, (see Findings of Fact #3-C) is also cited:

> . . . nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy as defined in Article IV of this agreement.

Defendant argues that because of the above cited statutes and portions of the negotiated collective bargaining agreement, the powers, rights and duties it possesses relating to the retention or nonrenewal of nontenured teachers cannot be delegated to an arbitrator. Defendant maintains it has "sole discretion" to employ or dismiss a teacher. The issue is not, however, a challenge to the Defendant's powers, rights or duties. The issue concerns the exercise of said powers, rights and duties relating to the renewal or dismissal of nontenured teachers.

The facts of School District v. Teachers' Association, 89 LRRM 2078 (Mich. Sup. Crt., 1975) are nearly identical if not identical to the facts of the instant matter. In School District v. Teachers' a probationary or nontenured teacher who was given notice of nonrenewal filed a grievance based upon a "just cause" provision in accordance with the grievance procedure contained in the collective bargaining agreement. The grievance

procedure contained final and binding arbitration. In addition to the statutory rights of the school district, Article II - Board Rights, of the collective bargaining agreement stated:

> To hire all employees . . . to determine . . . the conditions for their continued employment or their dismissal . . .

And, as in instant matter, the jurisdiction of an arbitrator could not usurp the rights of the school district. The school district argued that the teacher's "claim [grievance] is nonarbitratible under [the grievance procedure] where the board reserved to itself without limitation all powers, rights and authority confered upon and vested in it by the laws of this state, including the right to 'hire all employees' and to determine 'the conditions for their continued employment or their dismissal or demotion', the exercise of which powers, rights and authorities 'shall be limited only by the specific and express terms hereof' in conformance with the Constitution and laws of this state and the United States." The school district further contended that the teacher's claim "on its face" was not governed by the collective bargaining agreement but governed by the Teachers' Tenure Act. The aggrieved teacher and her representative contended that "on its face" the grievance was "governed by the contract." The Michigan Supreme Court cited a portion of the Steelworkers Trilogy; United Steel workers of America v. American Manufacturing Co., 363 U.S. 564, 568, 80 S.Ct. 1363, 4 L. Ed.2d 1403, 46 LRRM 2414 (1960) in addressing the question whether a dispute is arbitratible. While such question is for a court, the judicial inquiry "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." (Emphasis added). The Michigan Supreme Court concluded that, because of the just provision, the teacher's claim was based upon the collective bargaining agreement. It is clear, in the instant matter, the

teachers' claims were based upon the collective bargaining agreement because of Article XIII, Section 2 (see Findings of Fact #3-B). The Michigan Supreme Court also adopted a rule promulgated by the United States Supreme Court which puts the burden on the party who would exclude a matter from a general arbitration clause to do so expressly and explicity. I also adopt such rule. The Defendant in this matter did not show the matter of nonrenewal of nontenured teachers was expressly excluded from arbitration. Conversly, the matter is expressly included (see Findings of Fact #3-B).

The second question - Did the School District agree to arbitrate the nonrenewal of nontenured teachers? - must now be answered to apply the logic and principals of the aforegoing discussion. The language from the collective bargaining agreement, Article XIII, Section 2, part 3 (see Finding of Fact # 3-B):

> The teacher may, within ten (10) days after receipt of the statement of reasons, appeal the termination through the grievance procedure.

could not be more clear. The intent of the Parties to the collective bargaining agreement surely must be to allow a nontenured teacher to submit the matter of nonrenewal to arbitration. In comparing Article XII, Section 2 (Findings of Fact #3-B) to Section 20-4-206 MCA (see above), both of which relate to the notification of nontenure teacher nonrenewal, one can readily analyze that the collective bargaining agreement language is an extention of the procedure outlined in the statute. In Milberry v. Board of Education, 354 A.2d 559, 92 LRRM 2455 (1976), the Supreme Court of Pennsylvania addressed such a situation. The Court found that, "Thus the effect of the arbitration provision is to interject, in a case where a grievance is asserted, an additional step . . .", and concluded, "all the parties have done is to afford the teacher a further procedural protection."

The third question is whether the School District had authority to agree to arbitrate the nonrenewal of a nontenured teacher. This question was addressed by the Vermont Supreme

Court in Danville Board of School Directors v. Fifield, Danville Teachers Association, 315 A2d 473, 85 LRRM 2939 (1974). In Danville the school board argued that because of Vermont's school statutes which give school boards the sole power to hire and dismiss teachers, the question of the nonrenewal of a nontenured teacher cannot be delegated to an arbitrator. The Danville contract provided: "Nonrenewal of a teacher's contract may at the teacher's option be submitted to the grievance procedures as set forth in this agreement." The Court in Danville cited Board of Education of Union Free School District No. 3 of the Town of Huntington v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 282 N.E.2d 109, 114, 79 LRRM 2881, 2885:

> It is hardly necessary to say that, if the Board asserts a lack of power to agree to any particular term or condition of employment, it has the burden of demonstrating the existence of a specific statutory provision which circumscribes the exercise of such power.

Under the non-repealed Professional Negotiations Act for Teachers which was in effect at time of Wilbaux Education Association vs. Wilbaux County High School, 1978, 573 P.2d 1162, school boards were expressly prohibited from negotiating on "selection of teachers." However, in the instant case negotiable items for school boards are limited only to wages, hours, fringe benefits, and conditions of employment (see Section 39-31-304 MCA and Section 39-31-305 (2) MCA - above). Discharge or nonrenewal has long been recognized as a mandatory subject of bargaining under the topic of "conditions of employment. The text published by the American Bar Association and the Bureau of National Affairs (BNA) states on page 133 of the 1977 Cumulative Supplement under subtitle "Obvious Examples":

> The Board and the courts continue to hold that the layoff or termination of bargainng unit personnel is a mandatory subject of bargaining. * * * See e.g., Marter Sleck Corp. 230 NLRB No. 136, 96 LRRM 1309 (1977); W.R. Grace & Co., 230 NLRB No.76 95 LRRM 1459 (1977); and Caravelle Boat Co., 227 NLRB No. 162, 95 LRRM 1003 (1977).

In this matter the Defendant did not show a specific statu-

any provision that would prohibit it from agreeing to the arbitration provision relating to the nonrenewal of nontenured teachers. In using the reasoning of the Danville case, I find the Defendant is not without authority to negotiate and agree to such an arbitration provision. In fact, since "dismissal" or "nonrenewal" are considered a mandatory subject of bargaining under the topic of "conditons of employment", the Defendant had specific authority to negotiate such an arbitration clause pursuant to Section 39-31-304 MCA and Section 39-31-305(2) MCA.

The fourth and last question to explore before the ultimate question is: Did the negotiated collective bargaining agreement change any of the rights, duties or powers delegated to the School District? In Milberry, supra., the Court reasoned that the arbitration provision, relating to the dismissal or nonrenewal of nontenured teachers, was an additional step into the procedure - a further scruting. The Court said, "The authority of the school board to make the ultimate decision whether or not to suspend or discharge a teacher is not abridged." The arbitration provision "neither modifies nor creates an alternative to [the Codes] dismissal procedure . . ." The Defendant's duties, powers and rights have been left intact; "all the parties have done is to afford the teacher a further procedural protection", (Milberry supra). I agree with that reasoning. In this matter the Defendant has retained the "sole discretion" to employ or dismiss teachers. The arbitration provision provides a review process to ensure that teacher dismissals are not arbitrary or capricious.

The Defendant has admitted it refused to submit the matter of the nonrenewal of the nontenured teachers (Tone and Undem) to arbitration (see Findings of Fact #7). The collective bargaining agreement clearly states that such matters are subject to the grievance procedure and that procedure provides for arbitration (see Findings of Fact #3-B and #3-C and DISCUSSION). The Defendant had authority to negotiate such an arbitration provision and

such provision did not empty its powers, rights or duties (see DISCUSSION). The City of Livingston et al., vs. Montana Council No. 9, American Federation of State, County and Municipal Employees, et al., _____ Mont. _____, 571, P 2d 374 (1977), the Supreme Court found that, "Under Montana's Collective Bargaining Act for Public Employees or failure to hold a grievance hearing as provided in the contract is an unfair labor practice for failure to bargain in good faith." The facts and issue of City of Livingston are so very similar to this matter that I shall summarize this discussion with a quote from City of Livingston:

> The issue presented on appeal is whether the city's failure to provide Dyer a dismissal hearing constituted an unfair labor practice.
>
> By failing to grant Dyer a grievance hearing; the city breached its collective bargaining agreement, and thereby committed an unfair labor practice in violation of section 59-1605(1)(a), R.C.M. 1947. That section provides in part:
>
> "It is an unfair labor practice for a public employer to:
>
> "(a) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 59-1603 of this act;"
>
> Section 59-1603(1) provides:
>
> "Public employees shall have * * * the right * * * to bargain collectively * * *."
>
> The phrase "to bargain collectively" is defined in section 59-1605(3) as:
>
> "* * * the performance of the mutual obligation of the public employer * * * and the representatives of the exclusive representative to * * * negotiate in good faith with respect to * * * conditions of employment, or the negotiation of an agreement, or any question arising thereunder. * * *" (Emphasis added.)
>
> Thus, by statute, the duty to bargain "in good faith" continues during the entire course of the contract.
>
> The Supreme Court has held that "Collective bargaining is a continuing process. Among other things it involves * * * protection of employee rights already secured by contract." Conley v. Gibson, 355 U.S. 41, 2 L Ed 2d 80, 85, 78 S. Ct. 99 (1957). The processing of grievances in grievance hearings is collective bargaining. Timkin Roller Bearing Co. v. National Labor Rel. Bd., 161 F.2d 949, 954 (6th Cir. 1947). In Ostrofsky v. United Steelworkers of America, 171 F.Supp. 782, 790 (D. Md. 1959), aff'd., 273 F.2d 614 (4th Cir. 1960), cert. den., 363 U.S. 849, 4 L Ed 2d 1732, 80 S.Ct. 1628, (1960), the court stated: "* * * the employer had the same duty to bargain collectively over grievances as over the terms of the agreement."

Although the Court found a violation of 59-1605 (1) (a) R.C.M. (now Section 39-31-401 (1)), the language issued by the court

tion charged in this matter.

CONCLUSIONS OF LAW

Defendant, Savage Public Schools, Richland County Elementary District #7 and High School District #2, has engaged in an unfair labor practice within the meaning of Section 39-31-401 (5) MCA by its refusal to bargain collectively in good faith with the exclusive representative, Savage Education Association, affiliated with the Montana Education Association.

RECOMMENDED ORDER

It is hereby ordered that Savage Public Schools, Richland County Elementary District #7 and High School District #2 shall:

1. Cease and desist from failing to bargain in good faith with the Savage Education Association affiliated with the Montana Education Association.
2. Immediately implement the arbitration proceedings necessary to process the grievances of Dorothy Tone and Connie Undem.
3. Post these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER in the usual posting area(s) in a conspicuous manner for a period of not less than thirty (30) days.

NOTICE

Pursuant to Rule ARM 24.26.584, the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the parties.

DATED this 12 day of April, 1988.

BOARD OF PERSONNEL APPEALS

By _____
Stan Gerke
Hearing Examiner

CERTIFICATE OF MAILING

I, _____ do hereby certify and state that on the 12 day of April 1988, I did mail a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER to the following:

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